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No. 775

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

A. L. KORNMAN COMPANY,
Appellant,

vs.

DAVID M. PACK, Commissioner of Highways
of the State of Tennessee,
Appellee.

On Appeal from the Supreme Court of Tennessee.

MOTION TO DISMISS.

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David M. Pack, Commissioner of Highways, State of Tennessee, substituted as Appellee, vice D. W. Moulton, his predecessor in office, respectfully moves the Court to dismiss the appeal on the ground that it does not present a substantial Federal Question.

OPINION BELOW.

The opinion of the Supreme Court of Tennessee reported at 360 S. W. 2d 30, but is as yet unreported in the official reports of the Supreme Court of Tennessee, is set forth in the Appendix to Appellant's Brief (pp. 13-23).

STATUTE INVOLVED.

Tennessee Code Annotated, Section 20-1702 (Vol. 4, p. 483), provides as follows:

> "No court in the state shall have any power, jurisdiction or authority to entertain any suit against the state, or against any officer of the State, with a view to reach the state, its treasury, funds, or property, and all such suits shall be dismissed as to the state or such officers, on motion, plea, or demurrer of the law officer of the state, or counsel employed for the state."

This Statute was enacted pursuant to Article I, Section 17 of the Constitution of Tennessee which provides in pertinent part:

> "Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct."

QUESTION PRESENTED.

The real question presented is whether the Fourteenth Amendment of the Constitution of the United States should be so construed as to permit a former landowner to maintain a suit against the State to recover a part of its land which has been condemned for highway purposes, notwithstanding the foregoing constitutional and statutory provisions.

STATEMENT.

The Appellant admits that an easement for street purposes in the property here in question was acquired by a decree of condemnation; that the acquisition of the easement had necessitated the demolition of a large, multiple story building occupying the land and that the State of

Tennessee in conjunction with the United States and the City of Nashville constructed approaches to the Victory Memorial Bridge across Cumberland River over a portion of the property burdened by the easement (Appellant's Brief, p. 4).

The Appellant does not assert that the State did not pay adequate damages for the taking of its property.

Appellant does not question the correctness of the holding of the Supreme Court of Tennessee, "that the City (of Nashville) in acquiring the land in the first instance was merely the acquisition agent of the State" (Appellant's Brief, p. 14). The statute under which the property was condemned provides that the title acquired shall be in the State (Section 2, Chapter 73, Public Acts, 1949).

The Supreme Court of Tennessee in sustaining the plea of sovereign immunity in this case said, in part:

> "This doctrine was probably first recognized by the U. S. Supreme Court in **Cohens v. Virginia**, 6 Wheat. 264, 380; 5 L. Ed. 257, wherein Chief Justice Marshall, speaking for the Court, gives assent to the principle and says this: 'The counsel for the defendant-in-error . . . have laid down the general proposition, that a sovereign independent State is not suable except by its own consent.' This proposition, he adds, will not be controverted" (Appellant's Brief, p. 19).

The Tennessee Court further said:

> "It would be against public policy to force the State to defend after it has through lawful means condemned and paid the full value of the property . . . looking at it from a practical standpoint we know that even though the State merely condemned in the first instance an easement, that in the condemnation proceedings the damages are fixed by the jury at

an amount equal to the value of the fee . . . in a condemnation by the State to take the private property of a private individual, and in this case a large building was wrecked by the State as if the whole thing would be used, we cannot put our stamp of approval on allowing the State officials to be sued after the State had acquired the property by a legitimate condemnation suit and paid the damages. To a. w the State officials to then be sued for any little strips here and there along the highways . . . would take extra courts and the number of people . . . required to looks after . . . these things would be prohibitive. . . . The compensation for this easement taken was for the value of the land as if the fee had been taken". (Appellant's Brief, pages 22-3).

In the case of **Larson v. Domestic and Foreign Commerce Corporation**, 337 U. S. 682, 704, the Court recognized the practical problem in saying:

> "The Government as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right. As early recognized the 'interference of the Courts with the performance of the ordinary duties of the Executive Department of the Government, would be productive of nothing but mischief'" (Quoting from **Decatur v. Paulding**, 14 Pet. 497, 516).

necessity for taking an easement in Appellant's pr the amount of property rights required for the admittedly public purpose and whether there has been an abandonment of any part thereof are for "the final determination of the State Court". **Sauer v. New York**, 206 U. S. 548.

The general rule is that the necessity or expediency of appropriating particular property for public use is not a

matter of judicial cognizance, but one for the determination of the legislative branch of the government, and this must obviously be so where the state takes for its own purposes. The state possesses the power as a sovereign, and as a sovereign exerts it. Its citizens cannot call on the Courts to review the grounds on which the State has acted in the absence of legislation permitting that to be done. **Adirondack Railway Co. v. New York**, 176 U. S. 335, 349.

The provisions of the 14th Amendment to the Constitution of the United States do not override public rights existing in the form of servitudes or easements which are held by the Courts of the State to be valid under the Constitution and laws of the State. **Eldridge v. Trezevant** (1896), 160 U. S. 452, 40 L. Ed. 490.

The necessity for the right-of-way of the size taken was settled in the condemnation proceeding and it cannot be relitigated in this one.

"In the present case it cannot be contended successfully that the act of Wismer in filling up the ditch or depression on the right-of-way was an interference with the rights of the public. Upon the contrary, the effect, if anything, was to promote safety of travel along the paved portion of the road. Nor was his beautification of the area and the construction of the circular driveway giving an additional means of ingress and egress adverse to the rights of the public. It may be that in years to come the state will require an additional portion of the right-of-way in order to widen the pavement. If so, the area will be available. In the meantime, under its general power to control its highways, the State has authority to authorize any use of the right-of-way consistent with the purpose of the highway and not in derogation of the rights of the public or those of the abutting landowners.

"We hold, (1) that the necessity of a right-of-way of the size acquired in the condemnation proceeding was conclusively settled by the consent decree in that case and is not open for consideration in the present one; and (2) that there is no evidence indicating a purpose to abandon the right-of-way so acquired or any part of it." **State ex rel. Phillips v. Smith,** 34 Tenn. App. 608, 614, 616. Certiorari denied by Supreme Court of Tennessee, December 9, 1950.

To justify the conclusion that there has been an abandonment, there must be some clear and unmistakable affirmative act indicating a purpose to repudiate the ownership. **Phy v. Hatfield,** 122 Tenn. 694, 696.

Mere nonuser will not amount to an abandonment which will impair or defeat an easement. The failure to use must be accompanied by some act of the owner of the dominant estate, clearly indicating his purpose to set up no further claim in order to work abandonment. **Boyd v. Hunt,** 102 Tenn. 495, 499. Appellant avers that the strip of land here in question has been landscaped by the State. It is, therefore, being used.

It would be desirable from the Appellant's viewpoint to have this easement done away with, but we are dealing with fixed and settled property rights. **Cottrell v. Daniel et al.,** 30 Tenn. App. 339, 346. Certiorari denied by Supreme Court of Tennessee, October 18, 1947.

A grantee cannot abandon rights by mere implication, or by any conduct short of some clear and unmistakable affirmative act indicating a purpose to repudiate ownership. **Russell v. American Association,** 139 Tenn. 124, 133.

If the conduct of the then owners may be explained consistently with the continued claim to the land, an abandonment will not be presumed. **Reelfoot Lake Case,** 127 Tenn. 575, 597.

Divesture of a vested legal title by abandonment is unknown at common law, unless it results from some estoppel or adverse possession under a statute of limitations. **So. Coal & Iron Co. v. Schwoon,** 45 Tenn. 191, 225; **Tennessee Oil Co. v. Brown,** 131 Fed. 696, 65 CCA 524.

The guardrail between the approach to the bridge and the landscaped strip is no evidence of abandonment. A barrier in a stream does not prevent it being a navigable river. **United States v. The Montello,** 87 U. S. 443 (20 Wall.).

Landscaping of the small strip in question is not an abandonment of its use for highway purposes. It is in keeping with good highway planning, promotes safety and is consistent with National policy. The Congress has declared it to be in the public interest to assist the States to control the use of and improve areas adjacent to the interstate system of highways by regulating outdoor advertising signs. 72 Stat. 904, 23 U. S. C. A. 131. The Congress permits federal funds appropriated for such highways to be used for roadside and landscape development, 72 Stat. 916, 23 U. S. C. A. 319.

The Congress has declared the purposes of the Interstate System of Highways to be to connect by the most direct routes practicable the principal metropolitan areas, to secure the national defense and to connect with important international routes. 72 Stat. 888, 23 U. S. C. A., Sec. 103 (d).

In keeping with this policy it is and will continue to be necessary to acquire whole lots and the buildings thereon to construct straight and direct highways even though some small strips of the lots may not be immediately needed for construction purposes.

In the original taking it would have been a denial of due process to A. L. Kornman Company if all of its lot

except the small strip here in question and the one multiple story wall therein had been taken without compensating it for the whole value of its lot and building.

Finally, it is respectfully submitted that the State Court did not err in dismissing this suit on the ground of sovereign immunity.

It is an established principle of jurisprudence in all civilized nations, resting upon grounds of public policy, that a sovereign cannot be sued in its own courts or any other court without its consent or permission. This principle applies with full force to the several states of the Union. 49 Am. Jur. 301-2, States, Territories, and Dependencies, Section 91. This authority cites decisions from the Courts of thirty-two (32) states, as well as numerous decisions of the Supreme Court of the United States in support of this proposition.

As was pointed out in the case of **Petty v. Tennessee-Missouri Bridge Commission**, 359 U. S. 275, 279, the immunity doctrine is strictly applied in Tennessee.

In the case of **Malone v. Bowdoin**, 369 U. S. 643, the Court, in discussing the case of **United States v. Lee**, 106 U. S. 196, 27 L. Ed. 171, said:

> "The **Lee** case has continuing validity only 'where there is a claim that the holding constitutes an unconstitutional taking of property without just compensation.'"

In the case at bar it is not alleged by the complainant, nor can it be alleged, that the property in question was unlawfully acquired by the City of Nashville and the State of Tennessee. As a matter of fact, the complainant admits that the condemning authorities had a lawful right to acquire the property in question (R. p. . . .). Complainant does not allege that it was not justly compensated for the property in question.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the Appellee's motion to dismiss this appeal should be sustained and the appeal dismissed.

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